Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

APPEAL FROM
THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

DOUGLAS GREENE
. . . . . Petitioner

V.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE
. . . . . Respondents

PETITION FOR WRIT OF CERTIORARI

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DOUGLAS GREENE

October 7, 1994

QUESTION PRESENTED FOR REVIEW

Did the South Carolina Supreme Court interpret and apply election law in this case in a manner which is repugnant to the Constitution and/or Federal law, where, when qualified voters were subject to Registrar error, the poll manager was granted discretion to disenfranchise or not to disenfranchise these qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing and without record, and, in this case the poll manager exercised this discretion to disenfranchise qualified voters which could have affected the election?

LIST OF ALL PARTIES

DOUGLAS GREENE,
Petitioner

LAWANA R. MCKENZIE,
Respondent

MOSES MYERS,Chairman
Aiken County Election Commission
Respondent

J. LYNN MCCANTS,Executive Director
South Carolina Election Commission
Respondent

WILLIAM B. DEPASS, JR.,Chairman
State Board of Canvassers
Respondent

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OPINIONS BELOW

The Opinion of the State of South Carolina Supreme Court affirmed the decision of State Board of Canvassers which upheld the decision of the Aiken County Board of Canvassers upholding the election results in the race for Aiken County Council seat for District 3.

JURISDICTION

The certiorari jurisdiction of this Court is invoked on the grounds that the South Carolina Supreme Court (State Court) has interpreted and applied a body of state election law with respect to Registrar error, challenge ballots, and poll manager discretion, in a manner which grants the poll manager authority to disenfranchise, or not to disenfranchise qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing and without record, which is repugnant to and in violation of the Constitution and federal law, and creates conflict between state law and federal law which has not been, but should be settled by this Court. Jurisdiction in the Supreme Court of the United States is invoked under 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

This Appeal and Petition arises out of a challenge to a special election for Aiken County Council District 3. On April 27, 1993 the Aiken County Council District 3 election was conducted and the Aiken County Board of Canvassers declared Lawana R. McKenzie, the Democratic candidate, as the winner over Douglas Greene, the Libertarian candidate. Ms. McKenzie has been sworn into office.

The Aiken County Registration and Election Commission reported that McKenzie received 628 votes and that Greene received 623 votes.

The State Board upheld the decision of the County Board by a vote of 3-1. The dissenter filed a strong dissenting opinion.

On October 21, 1993 the Court issued a Writ of Certiorari to review the Order of the South Carolina Board of State Canvassers, dated June 15, 1993. The Writ of Certiorari was granted. An Order was issued June 20, 1994 upholding the election. A petition for rehearing was timely filed and the petition was dismissed by Order dated July 13,1994.

STATEMENT OF FACTS

Petitioner Douglas Greene was the unsuccessful, Libertarian candidate for the Aiken County Council District 3 seat in the April 27, 1993 election. The margin of victory of the Democratic candidate, Lawana McKenzie was five (5) votes. Many of the Precincts were split into two County Council Districts. Where

the Precincts were split into two County Council Districts, voters in both Council Districts voted at the same Precinct location. In split Precincts, the voters of both Districts are listed alphabetically on the same Precinct list. The same poll manager supervised the election, and issued ballots for both County Council Districts within a split Precinct.

Douglas Greene introduced the sworn affidavits of eleven (11) voters from split precincts, who stated they were not allowed to vote in District 3. One of these Affiants was the husband residing with his wife in District 3. The wife was permitted to vote in District 3, but the husband was required to vote in District 2. In its Order, the State Board of Canvassers found that:

> The record reflects that no challenged ballots were cast in District 3. ... Unfortunately, the affidavits and the record reflect that all of these voters were challenged by the poll managers and each voter subsequently voted in the District they were told. (Order, State Board p. 2).

The State Court found that the following facts are not in dispute:

> At least six qualified voters presented themselves at the Precinct to vote. Each of these voters was listed on the official voter registration roll

as living in District 2. These voters were allowed to vote in the precinct elections, but they were not allowed to vote in the District 3 County Council election. (Order, State Court p. 20 & 21).

SUMMARY OF ARGUMENT

The Supreme Court of the State of South Carolina has interpreted a body of election law and decided a question of voters rights in a manner which is repugnant to the Constitution and/or federal law, in that when Registrar error was at issue, the state resolved a conflict between voters rights, and the right of the state to conduct open, orderly, and expeditious elections, in favor of the state, in a manner which expedited the election by eliminating a challenge ballot hearing, and in the process granted the poll manager the discretion to disenfranchise, or not to disenfranchise qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing, and without record. The poll manager's exercise of this discretion, approved by the State Court, could have affected the outcome of this election. The exercise of similar discretion by poll managers could affect the outcome of all close elections in the future. The Libertarian candidate has called into question more ballots from disenfranchised voters than the margin of victory for the Democratic candidate. The election should be set aside and a new election ordered.

ARGUMENT

The evidence before the State Court indicated that each of the eleven Affiants who presented themselves at the polls as voters qualified to vote in District 3, were challenged by the poll managers because the official voter registration list indicated that they were registered in a District other than District 3. Thereafter the voters were instructed to, and did cast a regular ballot in the District assigned to them by the Registrar under substantially identical circumstances, which are generally described step by step as follows:

(1) In each case there was a discussion between the voter and poll manager as to District of residence; (Order State Board, Dissenting Opinion, p. 1)

(2) The voters informed the poll manager that they resided in District 3; (Affidavits of 11 voters)

(3) The official voter registration list indicated that the voter resided in a District other than District 3; (Official Registration List in evidence)

(4) The State Board found that the Affidavits and record indicated that the poll manager challenged each voter, but The State Court found that the Affidavits did not evidence that the challenge by the poll manager was sufficient to require a challenge ballot under the statute; (Order State Board, p. 2, Order State Court, p. 22)

(5) The poll manager refused each voter a regular ballot in District 3; (Order State Board, Dissenting Opinion p. 1)

(6) There is no evidence that any voter requested a challenge ballot in District 3;
(7) There is no evidence that any voter was informed of his right to receive a challenge ballot;
(8) There is no evidence that any voter was aware of his right to receive a challenge ballot;
(9) There is evidence, however, that each poll manager received instruction in the challenge ballot law;
(10) The poll manager instructed each voter to cast a regular ballot in the District as assigned by the Registrar; (Order State Board, p. 2)
(11) South Carolina Voter Registration cards do not indicate District assignment and there is no requirement to notify a voter if election officials change voter's District.(S.C. Code Ann. § 7-7-960 (Supp. 1993)
(12) The State Court found that applicable law ...." requires the voter or someone on the voter's behalf to "insist" on casting a challenge ballot", (the decision appeared to turn on this interpretation of law); (Order State Court, p. 22)
(13) The State Board found that no challenge ballots were cast in District 3; (Order State Board, p. 2)
(14) Election officials determined at least Six of the voters addresses on the official voter registration list used by the District 3 poll managers, were in fact within District 3, but were listed by the Registrar (on that same list) in other Districts; (Order State Board, Dissenting Opinion, p. 1)

(15) The State Court also found that at least Six of these voters were qualified to vote [in District 3]; (Order State Court, p. 20)

(16) Each voter was issued a regular ballot in accordance with the District assigned to him by the Registrar; (Order State Board, p. 2)

(17) Each voter cast the regular ballot issued to him. (Order State Board, p. 2)

The State Court's decision in this case upheld the election, when sufficient votes were at issue to set aside, where Registrar error was at issue, and where the poll managers decision disenfranchised a sufficient number of qualified District 3 voters to affect the election result. In this case the State Court approved the poll manager's discretion to disenfrachise, where the facts indicate that at least six District 3 voters were issued regular ballots in District 2, and when the Affidavits of these voters indicate that they told the poll manager they resided in District 3 before the ballots were cast. The State Board found that the affidavits and the record indicated that each voter was challenged by the poll manager. The State Court found that the Affidavits of the voters did not indicate that the poll manager's challenge to the voters was sufficient to require the poll manager to issue challenge ballots under the statute, where these voters or someone on the voter's behalf failed to insist on casting challenge ballots. (Order State Board, p.2, Order, State Court, p. 22)

The Court's decision in Hill v. S.C. Election Commission, 304 S.C. 150, 403

S.E.2d 309 (1991) upheld that election, when sufficient votes were at issue to set aside, where identical Registrar error in District assignment was at issue, and where the poll manager's decision under identical facts did not disenfranchise the qualified voters. The facts indicate that the poll manager in Hill exercised his discretion in the opposite manner and chose to issue the 40 voters regular ballots where they resided, and in Districts different from that assigned by the Registrar.

TO DISENFRANCHISE OR NOT TO DISENFRANCHISE

In the case of Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) , the petitioner [Roger Hill] won the District 3 seat by thirty-seven (37) votes, but the election was set aside by the South Carolina Board of State Canvassers (State Board) because forty (40) persons who were identified as being registered in the wrong District were given regular ballots in another District, which created an "over vote" in that District.

Roger Hill appealed to the South Carolina Supreme Court, which reversed the Order of the State Board, ruling that Taylor's protest was barred because no challenge was raised to these "over votes" at the time the ballots were cast. It is clear from Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991)that an election will not be set aside where Registrar error identical to this case is at issue, but where the poll

manager exercises his discretion in a different manner than in the instant case, so as to give a voter a regular ballot in a District of his residence. When faced with Registrar error, the poll manager in Hill exercised his discretion **NOT TO DISENFRANCHISE** the forty voters, and issued them regular ballots in another District. The election was upheld.

In Hill the Court apparently anticipated the factual situation in the instant case, and issued instructions.

> "The crux of the Respondent, George Taylor's protest was that in two (2) Precincts there were more ballots cast for District 3 Seats than there were District 3 voters indicated on the voter registration list for those precincts."

The Court commented further:

> "we see no reason why a challenge could not have been made at the time a voter was given a ballot for a different district than the one which appeared on the registration list"....and [H]ad a challenge been raised by Taylor at the time a ballot was dispensed, there would be no need to make assumptions of any kind, since the challenged ballot would have been segregated and a record made of the determination of the challenge."

In the instant case the poll manager followed only half of the instructions given by the Court in Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991). The State Board determined from the Affidavits and the record that the poll manager did challenge each voter. However, the poll manager failed to follow the second part of the Court's instructions from Hill in that no challenge ballots were issued after the poll manager challenged the voter. Even though the voters in the instant case timely identified the Registrar error, the District 3 voters were issued regular ballots in the incorrect District, and instructed to vote in accordance with the erroneous Registrar list. In doing so the poll manager exercised his discretion **TO DISENFRANCHISE** these qualified voter, who were the subject of Registrar error identical to that of the voters in Hill.

UNAWARE OF CHALLENGE BALLOT LAW

In Hill the Court found no error when the poll manager issued regular ballots in different Districts, to forty voters who were the subject of Registrar error, without requiring the voter insist on casting a challenge ballot. In the instant case, where Registrar error was timely brought to the attention of the poll manager, the Court would not interfere with the exercise of discretion by the poll manager, who, after challenging the voter, refused to issue the voter a challenge ballot, ruling that state law required the voter or someone on the voter's behalf to "insist" on casting

a challenge ballot.

Requiring the voter, who is the subject of Registrar error, to know election law with specificity, and to have presence of mind to "insist" on casting a challenge ballot by name to receive one, requires the voters, subject to Registrar error, to exhibit specific knowledge, not required of other voters, the difficulty of which far exceeds that previously declared to be an unconstitutional test or device. (Voting Rights Act, 42 U.S.C. section 1973) Under the State Court's interpretation of the challenge ballot law, the poll manager may exercise his discretion with impunity, to disenfranchise or not to disenfranchise any qualified voter, who is the subject of Registrar error, and who is **UNAWARE OF CHALLENGE BALLOT LAW**, with sufficient specificity to understand that he is entitled to a challenge ballot, to initiate the challenge, and also have the presence of mind to "insist" on casting a challenge ballot once he is challenged by the poll manager.

AT HIS WHIM

In Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) the Court refused to overturn the election where the margin of victory was 37 votes and 40 votes were called into question by Registrar error. The Court apparently found it acceptable for the poll manager to use his discretion to find Registrar error, and to use his discretion to issue those forty voters, he found to be listed in the incorrect District, regular ballots

in another District, without challenging the voters or requiring the voters to insist on a challenge ballot.

The instant case represents the opposite end of the "discretion spectrum" when identical Registrar error is at issue. In this case the Court refused to set aside the election where the poll manager exercised discretion to force voters, challenged as to District of residence, to strictly comply with the erroneous Registrar's list, and the discretion to issue voters regular ballots in Districts in which the voters told the poll manager they did not reside.

Between these extreme positions of these two cases, is an entire spectrum in which the poll manager can exercise discretion, **AT HIS WHIM**, to either disenfranchise qualified voters, or not to disenfranchise qualified voters.

WITHOUT NOTICE

It is clear in the instant case that the voters were aware that the poll manager was exercising discretion to force them to vote in a District where they told him they did not reside. There is no evidence that the poll manager notified the voters as to their rights under the challenge ballot law, and there is no evidence that any of the voters were aware of their rights.

In the Hill case, "[T]aylor concedes no challenges were made to the ballot at the time they were cast". In Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) it was the poll manager who recognized the Registrar error, and on

his volition issued different ballots. There is no indication that the voters in Hill were notified, or that they were even aware, that they were being issued ballots in conflict with the Registrar's official list.

The poll manager in Hill and in the instant case simply issued these voters, subject to Registrar error, regular ballots **WITHOUT NOTICE** of their right to receive a challenge ballot.

WITHOUT HEARING

In the instant case, and in Hill the poll managers exercised their discretion to issue the voters, subject to Registrar error, regular ballots rather than challenge ballots, thus expediting the election by eliminating the time consuming challenge ballot hearing and concluding the matter **WITHOUT HEARING.** The State Court, in refusing to set either election aside, affirmed the finality of the election and affirmed the exercise of discretion of the poll managers in expeditiously obtaining election finality.

WITHOUT RECORD

In the instant case and in Hill the poll managers exercised their discretion to issue the voter a regular ballot rather than a challenge ballot. The issuance of the regular ballot permits the poll manager to exercise his discretion **WITHOUT RECORD** for review.

REPUGNANT TO THE CONSTITUTION AND FEDERAL LAW

THE CONSTITUTIONAL AND STATUTORY RIGHTS OF A VOTER ARE VIOLATED BY:
(A) REQUIRING THE VOTER TO USE SPECIFIC STATUTORY LANGUAGE TO OBTAIN A CHALLENGED BALLOT;
(B) SETTING A DISCRETIONARY DEGREE OF "INSISTENCE" IN ORDER FOR THE VOTER TO BE OFFERED A CHALLENGED BALLOT; AND
(C) PERMITTING THE POLL MANAGER TO EXERCISE DISCRETION TO DETERMINE THE QUESTION OF REGISTRAR ERROR AT THE POLLS WITHOUT CREATING A RECORD FOR REVIEW, AND WITHOUT A HEARING.

In cases which involve the right of suffrage, as this case does, a modified form of strict scrutiny is applied. Strict scrutiny is a shorthand way of saying that where fundamental rights (or a suspect class) are involved, the state can infringe upon them only by a showing of a compelling state interest promoted by the least restrictive means. Prior to Anderson v. Celebrezze, 460 U.S 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), commentators, e.g. Tribe, Constitutional Law, were puzzled as to the actual standard used by the court. While the cases used the term "strict scrutiny", actual practice varied. These cases involve both fundamental rights - the right to vote, the right to associate and petition - as well as compelling state interests - the interest in conducting free and open elections. So

Anderson may be correctly described as either a balancing test or as strict scrutiny. But it is not to be confused with lower level balancing tests (of "arbitrary and capricious" versus "rational basis".)

Anderson sets out a four part test which has been adopted as the norm for analysis of First Amendment suffrage issues. Anderson was a ballot access case, but the paradigm is widely applied to suffrage cases.

First, the character and magnitude of the rights at stake must be assessed.

Second, the extent to which the practice, regulation, or statute infringes on the rights must be considered.

Third, the state must set out specifically what compelling interests are at issue, and these must be weighed and balanced against the rights.

Fourth, evaluating the extent to which the regulations are narrowly tailored so as to advance the compelling interests by the least restrictive means is the final step.

Subsequent cases have sometimes relaxed this fourth step where the rights infringements found in steps one and two have been minimal, while other cases have continued to strictly scrutinize the means-ends relationship in each case. Norman v. Reed, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). We need not enter that fray here, since here where voters were prevented from voting in their district of residence and for the party of their choice the infringement on suffrage is substantial rather than minimal.

Whether to apply the Anderson test,

or some other version of strict scrutiny, is a case of first impression in South Carolina as to election challenge cases. Knight v. Board, 297 S.C. 55, 374 S.E.2d 685 (1988), is not actually a strict scrutiny case, although it uses that term. Knight actually concerned whether statutes, involving absentee voting, should be strictly construed. That this is so can be verified by reference to the cases cited in Knight: Weichelmann v.City of Glencoe, 200 Minn. 62, 273 N.W. 638 (1937),Davis v.Board of Education of Beaufort County, 186 N.C. 227, 119 S.E. 372 (1923),and Hilliard v. Park,212 Tenn.588, 370 S.W.2d (1963), each of which dealt with strict construction, which is an entirely different line of inquiry.

Where equal protection violations are alleged, as here, the cases and commentators are split as to whether to apply Anderson or a more traditional strict scrutiny analysis. See Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), and New Alliance Party v. Hand, 933 F.2d 1568 (11th Cir. 1991) which raised but does not decide the issue of interplay between Fourteenth and Fifteenth Amendment review.

Shaw v. Reno, 61 U.S.L.W. 4818, 1993 U.S. Lexis 4406, reaffirms that strict scrutiny is the appropriate standard.

When election officials interpreted the challenge ballot law to require the voter to specifically ask for a challenged ballot in order to receive one and denied all District 3 residents challenged ballots because none asked for a challenged ballot, they violated S.C. Const. Art 1 § 1 , § 3 and § 5; Art 2 §

1, § 2 and § 4, Federal Voting Rights Acts and the U.S. Constitution.

Right of suffrage is a constitutional right vested in those persons who possess qualifications prescribed by Constitution, such right cannot be denied or abridged by legislative enactment; however, it is a right that legislature may regulate...to any extent not expressly or implicitly prohibited by Constitution. State ex rel. Edwards v. Abrams, 270 S.C. 87, 240 S.E.2d 643, 645 (1978)

Legislature's authority to require registration of voters does not empower it to modify or nullify citizen's constitutional right to vote. Voter registration laws must be...construed liberally and favorable to right to vote. A voter's failure to perform an act prescribed by election statute does not deprive him of privilege of voting, unless statute plainly and clearly requires such result by expressprovision or necessary implication. Funkhouser v. Landfried, 124 W. Va. 654, 22 S.E.2d 353, 356 (1942)

Election officials failure and refusal to offer a challenged voter the right to vote a challenged ballot and thereafter instructing the voter to vote in a District not his residence is violative of the S.C. Constitution which provides that every citizen ... shall be entitled to vote in the precinct of his residence ... (S.C. Const. Art. 2 § 4.)

When election officials challenged voters and determined the question as to the challenge during the election without a hearing they violated S.C. Cons. Art. 2 § 1 which provides that the right of

suffrage shall be protected ... from improper conduct.

An unconstitutional statute is in reality no law. The right of suffrage is a political right, not a property or civil right. The State Legislature has power to prescribe reasonable regulations as to how qualifications shall be determined. Provided that it does not deny the right of suffrage by making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote. Franklin v. Harper, 205 Ga. 779, 55 S.E 2d 221, 229 (1949)

Permitting poll managers or supervisor of elections, to decide on the degree of "insistence" that each voter must demonstrate in order to obtain a challenged ballot and exercise his constitutional right of suffrage is unconstitutional, in that it denies voters equal protection and equal right to cast their ballot for the person of their choice. (U.S. Constitution, Article XIV)

The Voting Rights Act section 208, 42 U.S.C. section 1973aa, in defining "test and device", provides that:

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational

achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Requiring voters to know specific statutory provisions or specific statutory language in order to obtain a challenged ballot is clearly an illegal "test or device" under the Voting Rights Act.

McKenzie argues that Article 2 Section 4 of the State Constitution was not violated and that the poll managers "endeavored to preserve this very section and to ensure that voters voted only in the precinct where they actually resided". (Return, Board p.15) McKenzie apparently is confusing "residence" with "registration". The actions of the poll managers clearly indicate they made the voters vote where they were erroneously registered, not where they actually resided, and, further, denied the voters their statutory right to prove their District of residency through the challenged ballot procedure.

The State further alleges that the actions of the poll managers in requiring a voter to know specific statutory language in order to obtain a challenged ballot, (Return, Board p. 10), does not constitute a "test or device" under the Voting Rights Act. On the contrary, this requirement falls squarely under the definition of "test or device" quoted by the State:

> " ...any requirement that a person as a prerequisite for voting...(1) demonstrate the ability to read, write,

> understand or interpret any matter, and (2) demonstrate any educational achievement or his knowledge of any particular subject...[emphasis added] (Return, Board p.16,)

The State and McKenzie rely extensively on Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) and Fielding v. S.C. Election Commission, 408 S.E.2d 232 (1991). Hill and Fielding both turn on the fact that challenges were not made at the polls. This case at bar is distinguishable, as challenges were made, by the poll managers in Precincts 15, 51 and 59 and by a poll watcher in Precinct 8. Hill and Fielding both involve illegal votes, which were not challenged before being cast, whereas this case involves votes, which were timely challenged prior to being cast. McKenzie admits that the instant case is distinguishable from Hill : "Unlike Hill where the "... voter was given a ballot for a different district than the one which appeared on the registration list [,]" here the voter was given a ballot for the actual district in which he was registered." (Return, Board p.3), but misses the central point: that the voters gave the correct addresses of their residency to the Registrar and the Registrar placed them in incorrect Districts.

Hill and Fielding found that a challenge must be timely and Trapp v. South Carolina Board of State Canvassers, 273 S.C. 163, 255 S.E.2d 670 (1979) found that the proper application of the

challenged ballot laws by election officials was mandatory.

In the facts of this case, where voters' names do not appear on the precinct list for the District of their residence, and that fact was brought to the attention of the poll managers before the ballot is cast, the mandatory challenged ballot procedure is the guarantee that the voter will not be disenfranchised through official error when, as in this case, the poll manager refuses to allow the voters to cast a regular ballot in the district of their residence.

CONCLUSION

Based upon the argument and authority presented, the Petitioner respectfully submits that the decision of the South Carolina Supreme Court and the body of South Carolina election law upon which it is based is repugnant to the United States Constitution and violates the Federal Voting Rights Act. The April 27, 1993 election for Aiken County Council District 3 should be declared void and a new election held.

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October 7th, 1994

CERTIFICATE OF SERVICE

I, James L. Leslie, Jr., Esquire, attorney for the Petitioner Douglas Greene, do hereby certify that I have served the foregoing Petition for Writ of Certiorari , by depositing copies of same in the United States Mail, postage prepaid, with return receipt requested, on or before the 7th day of October, 1994, addressed to the attorneys of record and parties as follows:

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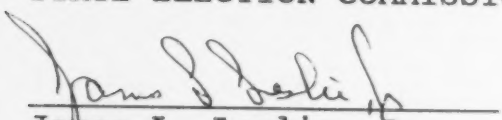
BOARD OF CANVASSERS AND
STATE ELECTION COMMISSION



James L. Leslie, Jr.
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Counsel of Record

Appendix A

AIKEN COUNTY
REGISTRATION & ELECTION COMMISSION
736 Richland Avenue West
AIKEN, SOUTH CAROLINA 29801
803-642-1528
MAY 6, 1993

ACCOUNT OF COMMISSIONERS OF AIKEN COUNTY SOUTH CAROLINA

GENERAL ELECTION HELD ON APRIL 27, 1993 IN AIKEN COUNTY

APPEAL HEARING FOR COUNTY COUNCIL DISTRICT #3

WE, EACH ONE FOR HIMSELF, DO HEREBY CERTIFY THAT WE HAVE HEARD THE APPEAL FOR COUNTY COUNCIL DISTRICT #3 FILED BY DOUGLAS GREENE. WE FIND THAT THERE IS **NOT SUFFICIENT** EVIDENCE OF ELECTION LAW VIOLATIONS TO UPHOLD THE APPEAL.

WE THEREFORE DENY THE APPEAL BY DOUGLAS GREENE AND UPHOLD ELECTION AS CERTIFIED ON APRIL 29, 1993.

SIGNED AND ENTERED BY:
MOSES MYERS, COMMISSIONER;
ARLENE LAYMAN, COMMISSIONER;
FLORIA HARRIS, COMMISSIONER;
BEN WATSON, COMMISSIONER;
DAVID NIX, COMMISSIONER;
DENTON T.JOHNSON, EXECUTIVE DIRECTOR

(Not Signing:
MELANIE HUTTO, COMMISSIONER;
ALICIA BROOKS, COMMISSIONER)

Appendix B

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF STATE CANVASSERS

Douglas Greene, Appellant	)	
vs.	)	ORDER
Lawana R. McKenzie, Respondent	)	
IN RE: Aiken County Council District 3 Seat April 27, 1993	)	

This matter is before the Board on appeal from the decision of the Aiken County Board of Canvassers to deny the protest of Appellant.

Appellant, Douglas Greene, was the unsuccessful candidate for the Aiken County Counvil, District 3 Seat in the April 27, 1993 election. The Aiken County Registration and Election Commission reported that the Appellant received 623 votes and the Respondent, Lawana R. McKenzie, received 628 votes. On May 3, 1993, the Appellant filee a protest of the election. The protest hearing was held by the Aiken County Board of Canvassers on May 6, 1993. The County Board determined that there was insufficient evidence of election law violations and denied the protest. The Appellant timely filed an appeal of the decision to this Board.

An appeal hearing was held before this Board on May 12, 1993. The Board reviewed the record and requested additional testimonies from Denton Johnson, Executive Director of the Aiken County Registration and Election Commission and Frances Pennington, staff assistant to Mr. Johnson.

The Appellant's writen protest contained five grounds to overturn the election. Of the five grounds, two related to the allegations that approximately thirteen voters were not alowed to vote in District 3. The Appellant introduced the sworn affidavits of eleven voters who stated they were not allowed the vote in District 3. Appellant argued that at least thirteen voters went tothe poll in their precincts tovote in District 3; that the poll managers challenged the voters qualifications to vote in District 3 based on their residence; that the voters insisted on voting in District 3; that the poll managers continued to refuse the voters the right to vote in District 3 and failed to issue the voters achallenged ballot; that as a result of the poll managers failure the issue the challenged ballots, these voters were deprived of their right to vote in District 3; and that the number of votes in question could have affected the outcome of the election.

The record reflects that no challenged ballots were cast in District 3. The record also reflects that of the eleven voters who presented affidavits, not one of them testified at the hearing before the county board. Consequently, this Board must rely on the affidavits and the record below. Unfortunately, the

affidavits and the record reflect that all of these voters were challenged by the poll managers and each voter subsequently voted in the District they were told. There is no evidence that the voter, when challenged, refused to vote. There is noevidence that the voter, when challenged, insisted in voting in District 3 and were refused a challenged ballot.

The Appellant has failed to meet the burden of proof required to substantiate the allegations. Likewise, there is insufficient evidence to substantiate the remaining allegations or that the the allegations, if proven, would have affected the outcome of the election.

The Protestant has the burden of proof in an election contest. As was stated in Fielding v. South Carolina Election Commission, 408 S.E. 2d 232 (1991):

> (e)very reasonable presumption is favor of sustaining a contested election will be employed and irregularities which do not appear to have affected the result of an election will not be allowed to overturn it.

See also Berry v. Spigner, 226 S.C. 183, 189, 84 S.E. 2d 381 (1954); Drawdy v. South Carolina Democratic Executive Comm., 271 S.C. 415, 417, 247 S.E. 2d 806 (1978).

Additionally, an election will not be overturned unless the errors would affect the outcome of the election. Drawdy, supra, at 421; State v. Ham, 275 S.C. 369, 373, 271 S.E. 2d 316 (1980).

The decision of the Aiken County Board of Canvassers is upheld and the Respondent, Lawana R. McKenzie, is

declared the duly elected candidate for the office of Aiken County Council District 3.

AND, IT IS SO ORDERED.

SIGNED and entered by William B. DePass, Jr.; Deborah B. Cureton; Chip T. Bradley

Columbia, S.C.
June 15, 1993

Dissenting Opinion:

Having not concurred with the majority of the Commissioners, I am submitting the following dissenting opininion:

Based upon information presented to the S.C. Board of Canvassers, there were major flaws in the Aiken County Council District #3, County Council race held April 27, 1993. In my opinion, these flaws could have affected the outcome of this election.

The difference in the votes was only 5 votes. Mr. Green, the loser, received a total of 623 votes and Ms. McKenzie, the winner, received a total of 628.

During testimony, Mr.Green presented affidavits from eleven voters declaring that they went to precinct #59 with the intentions of voting in the County Council District #3 race. However, upon their arrival at the Precinct, the poll manager told these individuals that they did not reside in District #3. These voters were then told that they must vote in District #2.

Several days after the election, it was determined by the Aiken County

Registration and Election Commission, that at least 6 of these voters did indeed live in District #3 where they had first attempted to vote. Of the remaining 5, the Aiken County Commission determined that 2 did not live in District #3. At the time of this hearing, no determination had been made as to the true residence of the remaining 3 voters.

The difference in the vote total was only 5 and we have evidence that at least 6 voters attempted to vote in District #3, but the poll managers would not allow them to vote in District #3. Following the directions of the poll managers, these 6 voters voted incorrectly in District #2. These 6 voters could have affected the outcome of the election.

Furthermore, it is my opinion that since there was some uncertainty and discussion as to the proper residency, before the ballot was cast, the poll manager should have offerred a challenge ballot to these voters. Several of my fellow commissioners offer that the discussions between the poll managers and voters was not heated enough. They contend that these voters should have been more demanding. Again, I disagree. A poll manager is an authority figure with the power to have individuals removed from the precinct and arrested. Most voters are reluctant to incessantly argue with a poll manager. I do not believe that a voter has to be overbearing, boisterous, or execssively agressive, in order to be afforded all opportunities to vote freely, correctly and unmolested.

Therefore, because of the above discrepancies, I am not sure of the intent

of the majority of the voters in Council District #3. Consequently, in my search for the truth I felt obliged to vote to grant the appeal and order a new election.

Roger Leaks, Jr.

June 15, 1993
Columbia, S.C.

Appendix C
THE STATE OF SOUTH CAROLINA
In the Supreme Court

Douglas Greene, Petitioner

v.

South Carolina Election Commission, The South Carolina Board of State Canvassers, The Aiken County Election Commission,The Aiken County Board of Canvassers and Lawana R. McKenzie, Respondents.

Appeal from Aiken County
South Carolina Board of Canvassers
William B. DePass, Jr., Chairman

Opinion No. 24101
Heard April 5, 1994-Filed June 20, 1994

AFFIRMED

James. L. Leslie, Jr., of Irmo, for petitioner

T. Travis Medlock, Attorney General; Edwin E. Evans, Chief Deputy Attorney General; Treva G. Ashworth, Deputy Attorney General, all of Columbia, for respondents South Carolina Election Commission and The State Board of Canvassers.

Dwight F. Drake and Carey T. Kilton, both of Nelson Mullins Riley & Scarborough, of Columbia, for respondent Lawana R. McKenzie

Robbin Stewart, of Kansas City, MO; and David L. Floyd, of North Augusta, both for Amicus Curiae

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TOAL, A.J.: Douglas Greene ("Greene") appeals the decision of the State Board of Canvassers upholding the election results in the race for Aiken County Council seat for District 3. We Affirm.

FACTS

Greene was the unsuccessful Libertarian candidate for the Aiken County Council, District 3 seat. The official vote total was 628 votes to 623 votes. Greene lost the election by 5 votes.

Greene challenged the election results. A hearing was held before the Aiken County Board of Canvassers. At the hearing, eleven affidavits of registered voters were entered into evidence. All of the affidavits stated that the voters presented themselves at the poll but the poll manager did not allow them to vote in the District 3 County Council election. All of the voters were listed on the official voter registration roll as eligible to vote in District 2. None of the voters were listed as eligible to vote in the District 3 election. Several days after the election, the Aiken County Registration and Election Commission determined that at least 6 of the voters listed as eligible to vote in District 2 actually lived in District 3.

The Aiken County Board of Canvassers, finding no error in the conduct of the election, voted to sustain the result. Greene appealed to the South Carolina Board of Canvassers. The South Carolina Board of Canvassers found Greene failed to

produce any evidence that the "voters when challenged insisted in voting in District 3 and were refused a challenged ballot." We agree.

LAW/ANALYSIS

> The scope of appellate review of the State Board's order "is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence." *Knight v. State Board of Canvassers*,297 S.C. 55,57,374 S.E.2d 685 (1988); *Simms V. Hamm*,275 S.C. 369,271 S.E. 2d 316 (1980); *Berry v. Spigner*,226 S.C. 183, 84 S.E. 2d 381 (1954). Every reasonable preseumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election willnot be allowed to overturn it.

Fielding v. South Carolina Election Commission, 305 S.C. 313, 317, 408 S.E. 2d 232, 234 (1991).

The facts are not in dispute. At least six qualified voters presented themselves at the precinct to vote.Each of these voters was listed on the official voter registration roll as living in District 2. These voters were allowed to vote in the precinct election, but they

were not allowed to vote in the District 3 County Council election. None of the affidavits upon which Greene relies claim that any of these voters requested a challenge ballot and were refused. Greene claims, however, that S.C. Code Ann. §7-13-810 (Supp. 1993) requires the poll manager to issue a challenge ballot when the voter questions the district to which the voter is assigned on the precinct voter registration roll.

S.C.Code Ann. § 7-13-810 (Supp.1993) provides in pertinent part as follows:

> The managers of election shall prevent any person from voting when they have good reason to believe the person has already voted. They should refuse to allow any person to vote who is not a registered elector or who has become disqualified for any cause to vote in such voting precinct...*Any elector or qualified watcher may, and it shall be the duty of the managers of the election to, challenge the vote of any person who may be known or suspected not to be a qualified voter....* The manager shall then present such challenge to the voter and act in accordance with the provisions provided for in this section. All challenges must be made before the time a voter receives a paper ballot or enters into a voting machine and no challenge may be considered

after that time.

Id. [Emphasis added].

The South Carolina Election Commission contends something more is required before the poll manager must issue a challenge ballot. We agree. S.C. Code Ann. § 7-13-830 (Supp. 1993) provides is pertinent part as follows:

> When any person is so challenged the manager shall explain to him the qualifications of an elector and may examine his [sic] as to the same; and if the person *insists* that he is qualified and the challenge is not withdrawn, his vote shall be received and placed in an envelope on which shall be written the name of the voter and that of the challenger.

"The elementary and cardinal rule of statutory construction is that the Court 'ascertain and effectuate actual intent of the legislature.'" *Horn v. Davis Elec. Constructors, Inc.*,307 S.C. 559, 563, 416 S.E.2d 634,636 (1992) [internal citations ommitted]. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Bell v. South Carolina State Highway Dept.*, 204 S.C. 462,467,30 S.E.2d 65,67, (1944). While we recognize the apparent mandatory language of S.C. Code Ann. § 7-13-810 (Supp. 1993), to read the statute as urged by Greene would require the poll manager to issue a challenge ballot to

every voter who questioned the voting district listed on the voter registration roll. We do not believe the legislature intended such a result. S.C. Code Ann. §7-13-830 (Supp. 1993) requires the voter or someone on the voter's behalf to "*insist*" on casting a challenge ballot.

"The making of a challenge is essential to the preservation of an adequate record upon which appellate review can be had." *Fielding v. South Carolina Election Commission*, 305 S.C. 313, 318, 408 S.E. 2d 232,235 (1991). Requiring the voter to insiston a challenge ballot at the poll preserves the record and prevents after-the-fact challenges to otherwise proper elections. The purpose of S.C. Code Ann. § 7-13-710, et. seq. is to assure the orderly and fair election of our public officials. Adopting Mr. Greene's interpretation of the Act would frustrate rather than further the legislative goal. Under the interpretation of the Act urged by Mr. Greene, affidavits of voters who did not bother to vote but were unhappy with the results could be collected for an after-the-fact challenge. In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required that the voter "insist" upon casting a challenge ballot. S.C. Code Ann. § 7-13-830 (Supp.1993). In *Fielding*, we noted that a vote may be challenged by a watcher, elector, or manager. Thus, it was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote in the District 3

election. As in *Hill v. South Carolina Election Commission*, 304 S.C. 15, 403 S.E.2d 309 (1991), the errors in placing voters in districts to which they did not belong were errors that could have been discovered prior to the election. Affidavits of voters who did not insist in voting in the District 3 election simply did not rise to the level of a "challenge" which required the issuance of a challenge ballot under the statute. See *Berry v. Spigner*, 266 S.C. 183, 84 S.E.2d 381 (1954) (affidavit of voter that poll manager cast voter's vote did not constitute challenge).

AFFIRMED.

CHANDLER, A.C.J., FINNEY, MOORE, JJ., and Acting Associate Justice William H. Ballenger, concur.

Appendix D

The Supreme Court of South Carolina
July 13, 1994

James L. Leslie, Jr., Esquire
P.O. Box 327
Irmo, S.C. 29063

RE:Greene v. S.C. Election Commission, et al.

Dear Mr. Leslie;

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing denied.

/s/ A. Lee Chandler	C.J.
/s/ Ernest A. Finney, Jr.	A.J.
/s/ Jean H. Toal	A.J.
/s/ James E. Moore	A.J.

July 13, 1994."

Very truly yours,

Brenda F. Shealy
Deputy Clerk

/bs

CC: The Honorable T. Travis Medlock
The Honorable Edwin E. Evans
The Honorable Treva G. Ashworth
Dwight F. Drake, Esquire
Carey T. Kilton, Esquire
David L. Floyd, Esquire
Robbin Stewart, Esquire